



## OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL*James C.*

Honorable Edwin Lacy, Commissioner  
Department of Public Safety  
Austin, Texas

Dear Sir:

Opinion No. O-2754

Re: Official misconduct of county  
commissioners and related  
questions.

So far as your letter of September 11th presents questions to be answered as applied to the facts set out in the documents accompanying it, it presents mixed questions of law and fact which cannot be answered by this department. The fact questions present issues to be determined by a jury or the court in a proper proceeding. We will therefore undertake to answer your questions only hypothetically and upon the assumption that certain facts may be found to be true.

With respect to your first question, you are advised that, if it should be established in a proceeding for the removal of a county commissioner that he wilfully exercised his power and authority to employ persons to work upon the roads of the county, to engage the services of persons not needed in such work, for the purpose of furthering his personal political ambitions, such, in our opinion, would constitute "official misconduct" within the meaning of Article 5973, R. S. 1925.

The Constitutional oath of office is as follows:

"Members of the Legislature, and all officers, before they enter upon the duties of their offices, shall take the following oath or affirmation:

"I, \_\_\_\_\_, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of \_\_\_\_\_ of the State of Texas, and will to the best of my ability preserve,

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protect, and defend the Constitution and Laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God."

It will be observed that the oath has relation only to bribery of electors "at the election" at which the officer was elected. The oath does not have reference to nominations. So that a county commissioner who wilfully exercises his power to employ persons to work upon the roads of the county, to employ persons not needed in such work in consideration of their voting for his nomination at a primary election does not constitute a violation of the Constitutional oath of office so as to subject him to removal from the office in the event he should be elected thereto at the general election. He may be punished under the provisions of Penal Code, Article 196, for corruptly using his authority or influence, but such punishment does not carry a disqualification for election to the office to which he has been nominated.

In this connection, it must be remembered that the Legislature has seen fit to provide that "No officer in this State shall be removed from office for any act he may have committed prior to his election to office." Article 5986, as amended Acts 1939, 46th Leg., House Bill 493, Section 1.

A commissioner, then, cannot be removed from his office during the second term to which he may have been elected for an act which he has committed during his first term in such office.

In answer to your third question, you are advised that a county commissioner who wilfully exercises his power to employ persons to work upon the roads of the county to engage the services of persons not needed in such work for the purpose of furthering his personal political ambition is not guilty of misapplication of public funds, as that offense is defined by the Legislature. In the case of *Sarna vs. State*, 135 S. W. (2d) 105, the Court of Criminal Appeals held that a county

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commissioner who filed a fictitious account and secured and cashed a warrant and gave a portion of the proceeds in excess of payment due on an auto to the seller of the auto could not be convicted of misapplication of public funds, in the absence of evidence that the money involved was in the hands of the commissioner in his official capacity, holding that county commissioners are not by virtue of their office custodians of county funds.

With respect to your fourth and last question, you are advised that in the opinion of this department the wrongful employment or wrongful approval of accounts against the county for services rendered by an employee unnecessarily hired to work upon the public roads does not constitute a theft of county funds by false pretext. As stated by the Supreme Court of Texas in the case of State vs. Kingsbury, 37 Tex. 159: "There is no written law of this State expressly defining the act of the county court in unlawfully approving an account against the county as a penal offense."

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

*Richard W. Fairchild*

Richard W. Fairchild  
Assistant

RWF:rv

APPROVED DEC 5, 1940

*Gerald Mann*

ATTORNEY GENERAL OF TEXAS

